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Supreme Court of the United States

OCTOBER TERM, 1947

No. 449

MARDEN & MURPHY, INC., *Appellant*

v.

CITY OF LOWELL, *Appellee*

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

This case is pending in this Court on appeal from the decision of the Land Court of Massachusetts as affirmed by the Supreme Judicial Court. The appeal is taken under Section 237(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat., 937; 28 U.S.C. Section 344(a) because there is drawn in question in this cause the validity of a statute of the Commonwealth of Massachusetts (St. 1938, c. 478) on the ground of its being repugnant to the Fourteenth Amendment and that the decision is in favor of its validity.

A motion by the Appellee to dismiss or affirm, with the Appellee's Statement Opposing Jurisdiction, were served upon Appellant November 10, 1947.

I.

THE APPEAL IS NOT DIVISIBLE BUT MUST STAND OR FALL AS A WHOLE

In subdivisions I and II of its "Statement Opposing Jurisdiction" Appellee seeks dismissal or affirmance as to Parcel 1 and as to Parcel 4 (R. 337)*, and in subdivision III

* Page references are to the record in this case as docketed on the appeal.

Appellee complains that certain of the Assignments of Error (Numbers 9, 10, 11 and 12) do not attack the statute but are reviewable only by *certiorari*, (R. 338) and that the Assignments of Error just mentioned attack the assessments for all the years from 1933 to 1941, both inclusive, whereas, as Appellee claims, Appellant is not entitled to question them except for 1938 and 1939. (R. 339)

It is conceived that the appeal cannot be allowed in part and disallowed in part; that it is not separable or divisible, and that it must stand or fall as a whole. These contentions of the Appellee are therefore not material on the question of allowance or disallowance of the appeal. They are merely contentions as to what issues will be open on the appeal if the appeal shall stand. The question whether the statute is repugnant to the Fourteenth Amendment is directly raised in Assignments of Error numbers 1, 2, 3 and 8. (R. 293-295)

That some of the Assignments of Error relate to federal questions other than the validity of the statute is wholly unimportant so far as the allowance or disallowance of the appeal is concerned. The cases show that where a substantial federal question is involved, which justifies appeal, and where appeal has been taken, this Court will consider any *other* federal questions raised in the record, which independently considered would support *certiorari* only.

Flourney v. *Wiener* 321 U.S., 253, 263, 754 (1944)

Prudential Insurance Company v. *Cheek* 259 U.S., 530, 547 (1922)

It is the intention of the Appellant to file a petition for *certiorari* in this case, as ancillary to the appeal, and Appellee will then have the right to set forth any objections which it may have to the granting of such petition.

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II.

No Adjudication of Values of Appellant's Properties was Made by the State Court and None could Have been Made as the Issue was Not Open

The Appellee in subdivision III also appears to claim that the Land Court made findings as to the value of Appellant's properties, and therefore as to the propriety of the assessments as to amount. (R. 339-340) This is a clear misapprehension. No evidence of value was introduced at the trial in the Land Court by either side, and that Court made *no findings as to value*. Appellant did introduce evidence to show that, in the values which the Assessors placed upon the property for all the years in the period, they had *included* an item of *twenty cents per square foot* for the *water power* which they *knew the Appellant had sold*. The Land Court's statement that

> "We have here at the most a raising or enhancing of the value of Parcels 1 and 2 by twenty cents a square foot." (Dec. R. 26)

which is referred to by the Appellee (R. 339), immediately followed a discussion of the Massachusetts rule that water power is not taxed independently but merely as an "enhancement" of the value of the land to which it is applied, and his further statement that there was no separate or independent assessment of water power but that the land and water power together were given a single valuation. (Dec. R. 24-26). What the Court obviously meant was that the addition of twenty cents per square foot which the Assessors had made for water power was only an *over valuation* of the land, for which Appellant "might have sought abatement in each of the years," (R. 26) and that such abatement proceedings were his only remedy. This is the same ruling which we find in the opinion of the Supreme Judicial Court. (R. 315-316)

Furthermore, the issue as to the *amount* of the assessment was not open; for under Massachusetts law a person

assessed cannot question the *amount* of the tax in a proceeding involving the validity of the tax sale or taking.

Garden Cemetery Corporation v. *Baker* 218 Mass. 339

Nichols on Taxation in Massachusetts (3rd. Ed.) p. 387, 395

It still remains true, as the Supreme Judicial Court stated in this very case, that abatement proceedings are the exclusive remedy for the taxpayer who questions the *amount* of his assessment. (R. 316)

But this is very far from saying that the taxpayer, in a proceeding to foreclose his rights under a tax sale or taking, cannot set up that the assessments upon which the tax was based were *wholly invalid.*

If it should first be held that the statute complained of (St. 1938, c. 478) is constitutional and that the Appellant was properly denied any hearing as to its validity or amount; and if it should then be ruled that the Appellant cannot question the validity of the assessment in this proceeding, the violation of constitutional right, the denial of due process of law and the denial of the equal protection of the laws would then be *complete;* as it would appear that *no* remedy is available either to question the wrongful assessment in the first instance or to defend against the seizing of the taxpayer's property in satisfaction of the tax based on such assessment.

III.

Appellant's Jurisdictional Statement Sufficiently Showed That This Case is Within the Jurisdictional Provisions Relied on

Appellee in subdivision IV of its Statement objects that Appellant's Jurisdictional Statement fails to show that the case is within the jurisdictional provisions relied on—specifically that it does not show that the 1938 and 1939 taxes here involved were more than $1,000. "on any parcel of real

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estate." (R. 342) Rule 12, paragraph 1 of the Rules of this Court requires that the jurisdictional statement "shall show that the nature of the case and of the rulings of the Court was such as to bring the case within the jurisdictional provisions relied on." Although the specific statement to that effect appears to have been omitted, we submit the Jurisdictional Statement does clearly and amply "show" that the tax on each of the Parcels 1, 2 and 3 for each of the years, was in fact more than $1,000. The opinion of the Supreme Judicial Court of Massachusetts which was annexed to the jurisdictional statement states clearly that *"it is not disputed that the tax was greater than the amount for which an abatement might be sought without payment upon the tax."* (R. 316) Although in the quoted statement the Court apparently had in mind particularly Parcels 1 and 2, it was true in fact as to each of the three parcels for both 1938 and 1939. This has never been questioned. Indeed the only reason why either the Land Court or the Supreme Judicial Court was dealing with the constitutional question at all was because the taxes on one or more of the parcels did exceed $1,000.; otherwise the question would never have arisen.

IV.

The Only Opinion Required by Rule 12, Paragraph 1 was Appended to the Jurisdictional Statement

In subdivision V of its Statement Opposing Jurisdiction the Appellee objects that, while the Appellant *did* append to its Statement on Jurisdiction a copy of the opinion of the Supreme Judicial Court in this case, it did not also append copies of the opinions in two earlier cases *cited* by the Court, namely,

Old Colony Railroad Company v. *Assessors of Boston*, 309 Mass., 439 (1941)

Lincoln Hotel Co. v. *Assessors of Boston*, 317 Mass., 505 (1945)

and further that it did not append a copy of the decision of the *Land Court* in this case. (R. 342-344)

The Appellant respectfully submits that the opinion attached to its Statement on Jurisdiction was the only one required under the rule. The two cases cited in that opinion were clearly not "earlier opinions in the same case or opinions in companion cases." The opinion in the *Old Colony Railroad Company* case was long, and the Appellant in its Statement gave precise references to the pages in each of the cited cases where the question of the validity of the statute was passed on. (R. 302)

Appellant understands that the rule in question is not intended to include decisions or memoranda by the trial court, where the case has been appealed and the entire matter passed upon by the State Court of last resort. The decision of the Supreme Judicial Court is the authoritative decision in Massachusetts. The decision of the Land Court was long and dealt with much that was wholly immaterial to the issues before this Court. It is readily available, if desired, as it is set out in full in the record. (R. 13-45)

Appellee quotes from the decision of the Land Court to the effect that Appellant did not argue the constitutionality of the statute before that Court, stating that it had been passed on by the Supreme Judicial Court in two cases. Under these circumstances it would have been futile for the Appellant to argue the constitutionality of the statute before the Land Court. The quoted portion, however, makes it clear that the Appellant "earnestly contended" that the statute "violates the due process and equal protection provisions of the Fourteenth Amendment to the Constitution"; and it is obvious from the record that the question whether the statute was repugnant to the Fourteenth Amendment was thoroughly argued before the Supreme Judicial Court. (Statement on Jurisdiction R. 301-302; 308-310; Opinion (R. 316)

V.

Appellant's Jurisdictional Statement Clearly Shows that the Appellant is One of the Class Affected by the Statute

Appellee notes in subdivision V (R. 343-344) the statement in the decision of the Land Court *first*, that the question whether Marden & Murphy, Inc. was unable to comply with the provisions of the statute as to payment was immaterial and *second*, that

> "If it should be material, however, it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment."

and in subdivision VI (R. 344-345) Appellee objects that, *because* of the failure of the Land Court to find that Appellant was financially unable to pay the tax, Appellant is not shown to be one of the class affected by the statute.

If the question of the financial inability of this particular taxpayer is material to its right to question the validity of this statute, Appellant will respectfully ask this Court to review that finding on the ground that there is *no evidence* to support it. This we understand is permissible under the decisions.

> *Hooven & Allison Company* v. *Evatt* 324 U.S., 652, 659 (1945)
>
> *United States* v. *Pink* 315 U.S., 203, 238 (1942)
>
> *Fiske* v. *Kansas* 274 U.S., 380, 385-386 (1927)
>
> *Creswill* v. *Grand Lodge* 225 U.S., 246, 261 (1912)

The Land Court's conclusion was a mere inference from the balance sheets of Appellant during the periods when the payments of tax must be made, if at all, in order to permit the filing of an appeal, that is, during the time permitted for such appeal. The evidence was overwhelming and uncontradicted as to Appellant's lack of money and inability to obtain it.

The present, however, is not the appropriate place or time to discuss this question of fact.

But wholly apart from the financial condition of this Appellant, we submit that Appellant is within the class which is injured because its tax on each of the Parcels 1, 2, and 3, *as assessed*, was more than $1,000. in each of the two years, and it is, therefore, within the requirement of *payment*. Without doubt, in a large public, there must be a substantial number of persons who own land assessed for more than $1,000. but who are without the necessary wherewithal to pay. The statute makes no provision for one in that situation. It states no exceptions. Nor is there any room in the statute for an *interpretation* which would permit the taxpayer who is impecunious to obtain a hearing. Whether he has the money or not, he must pay or he cannot appeal and we respectfully submit that if the denial of a hearing to such taxpayer results in depriving him of his constitutional rights, then the statute must fall.

In *United States* v. *Ju Toy* 198 U.S., 253 (1905), the Court said; per Holmes, J. at pages 262-263,

> "The relevant portion (of the statute) being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exemption of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States* v. *Reese*, 92 U.S. 214, 221; *Trade-Mark Cases* 100 U.S., 82, 98, 99; *Allen* v. *Louisiana*, 103 U.S., 80, 84; *United States* v. *Harris*, 106 U.S., 629, 641, 642; *Virginia Coupon Cases*, 114 U.S., 269, 305; *Baldwin* v. *Franks*, 120 U.S., 678, 685-689; *Smiley* v. *Kansas*, 196 U.S., 447, 455."

The exemption of the taxpayer who is financially embarrassed cannot be read into the statute "merely for the purpose of saving what remains", and the statute must fall as a whole.

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VI.

The Statutory Provisions as to a Hearing Before the Board of Assessors are Wholly Insufficient

The next objection of the Appellee (subdivision VII; R. 345-347) relates to a matter which we had supposed was long since settled. He argues that Appellant had the right to a hearing before the Assessors of Lowell, and that this was enough. A hearing before the Assessors might be sufficient on questions of *fact*, if it could have been had, but not as to questions of *law* or *constitutional right*.

> *Ohio Valley Water Company* v. *Ben Avon Borough* 253 U.S. 287 (1920)
>
> *Wadley Southern Railway* v. *Georgia* 235 U.S., 651 (1915)
>
> *Chicago, Burlington & Quincy Railroad* v. *Osborn* 265 U.S., 14 (1924)
>
> *Baltimore & Ohio R. Co.* v. *United States* 298 U.S., 349, 368-369 (1936)

Moreover, it appears beyond question that no hearing was afforded the Appellant even before the Assessors. This is a clear inference from the fact that the Assessors took no action on the applications for either year and sent no notice of any kind to the Appellant regarding them. (Dec. R. 27-28) It also appears affirmatively in the evidence. (Evid. R. 209, 222, 260-261)

Nor was there any way of compelling a hearing before the Assessors. The statute gave them four months in which to act and provided that, at the expiration of that time, the applications should be deemed to be refused, and the time for appeal should begin to run, and that the Assessors should then have no further authority to act on the petition except that during the period allowed for appeal they might make a final settlement by agreement with the applicant. (St. 1938, c. 478, s. 1) The statute contains no affirmative requirement that they shall either grant a hearing or make a decision, and

it appears to be settled that the taxpayer could *not* have sustained mandamus against them.

Eastern Racing Association v. *Revere* 300 Mass., 578

That case dealt with the statutes as they existed in 1937 and held that a taxpayer who had not appealed to the Appellate Tax Board could not compel the Assessors to act on his application. The statutes at that time did not deprive the Assessors of the power to act after the four months period had expired, and the right to compel the Assessors to act, therefore, if it existed, would not have been lost. That case is therefore a definite authority to the effect that mandamus would not have lain.

VII.

The Federal Question Here Involved Is Very Substantial

Finally the Appellee suggests in subdivision VIII (R. 348) that the federal question involved in this appeal is not substantial. That question is whether a statute of Massachusetts is repugnant to the Fourteenth Amendment, which provides affirmatively that before the taxpayer can appeal from the refusal or failure of the Assessors to grant abatement, or in other words before he can obtain an adequate hearing, he must pay the entire tax, as assessed, or must pay one-half the tax and satisfy the Appellate Tax Board that he is unable presently to pay the balance. As to the cases which he cites and discusses under this objection, we submit that none of them is in point; and that the extracts which he quotes from the opinions cannot be properly understood unless one has in mind the context and the facts to which they refer. We will discuss them briefly.

In *Tennessee* v. *Sneed* 96 U.S., 69 (1877) the plaintiff sought a writ of *mandamus* to compel the Collector to receive

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in payment of tax certain bills of the Bank of Tennessee which the plaintiff brought into Court. The defense set up that a state statute forbade suit against the state or its officers and that the receipt of the bills in question in payment of tax was prohibited by the new State Constitution of 1865, and by a statute passed in 1873. The charter of the Bank of Tennessee (1838) had provided that such bills should be receivable for taxes. After referring to the claim of the plaintiff that the Acts of 1873 were laws impairing the obligation of the contract in the Bank charter, the Court said (Hunt, J. p. 73)

> "This is the only point in the case involving a question of federal jurisprudence and the only one that it is necessary for us to consider."

In *Phillips* v. *Commissioner* 283 U.S., 589 (1931) the rule laid down by the Court was that

> "Where only property rights are involved mere *postponement* of the judicial inquiry is not a denial of due process *if the opportunity given for ultimate judicial determination of the liability is adequate.*" (Italics ours) (pp. 596-597)

Neither payment nor the giving of security was a condition precedent to obtaining a judicial review.

The case of *Nickey* v. *Mississippi* 292 U.S., 393 (1934) has no application to the present case. There the appellants who were non-residents had been assessed on tracts of land in Mississippi. They failed to pay on one tract only, and the state brought suit, attaching other lands on which the tax had been paid. The appellants secured the release of the attachments by giving bond. In that case it was held by this Court that as the State Court had ruled the appellants (defendants below) could assail the correctness and legal sufficiency of the assessments as matters of defense in the suit, and as the defendants had appeared and had full opportunity to be heard before the decree became final, there

was no denial of due process; also that the State could collect the tax on one parcel out of other parcels owned by the same person, even though non-residents. This appellant can have no criticism of that decision on either point, but the case is not relevant here. The giving of the bond to release the attachment was apparently wholly voluntary.

In *McMillen* v. *Anderson* 95 U.S., 37 (1877) it is particularly necessary to have the facts of the case in order to understand the portions the Appellee has quoted. In that case the plaintiff sought an injunction against the sale of its property which had been seized by the Collector for taxes. The Court granted the injunction upon the plaintiff's giving bond and security. It appeared that the plaintiff was liable for the tax. The question was as to the validity of the statute under which the Collector acted. The Court merely held that the statute authorizing seizure was a proper means of enforcing payment and that the Collector could act under it. The fact that the Court required the giving of security as a condition of issuing an injunction against the Collector could not reasonably be objected to. It was perfectly sound to permit the Collector to exercise his summary authority to collect since the statute under which he acted was valid.

These cases we submit are not even relevant here.

In the Appellee's Statement Opposing Jurisdiction he appears to represent the Appellant as contending that the taxpayer "has a constitutional right to withhold payment of a tax until it has been finally adjudicated." (R. 351) This Appellant makes no such contention, and it never has.

We do not argue, and never have, that the processes of collecting the tax should be suspended pending such determination. Rights and remedies available to the Collector of Taxes are various. He may sell or he may seize or "take" the land, as he has done in this case; or he may sue and attach the taxpayer's property. All the summary remedies remain, and should remain, in full force and effect. We argue only *that the requirement of payment of the tax as a condition of obtaining a proper hearing is fundamentally unfair and unjust, and that it violates the Fourteenth Amendment.*

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A number of the cases cited by the Appellee state clearly the rule for which we here contend, namely, that the taxpayer must have *the right to be heard before the tax is finally established against him.* This Appellant through no fault of its own but only because of lack of funds has been afforded no hearing before any tribunal or body, administrative or judicial, either before or after assessment.

The question whether a statute which affirmatively imposes such a condition upon the right to a hearing is repugnant to the Fourteenth Amendment of the Constitution of the United States has never been decided by this Court so far as we have been able to ascertain. Certainly that question is not disposed of in the negative by any authorities cited by the Appellee. The decisions of this Court for the past sixty years all emphasize without qualification the right of the taxpayer to a hearing. The effects of this statute which bars such a hearing to him who cannot pay may be far-reaching, and we respectfully submit that its validity is a substantial question deserving of consideration by this Court.

VIII.

CONCLUSION

In conclusion this Appellant states its intention to file a petition for *certiorari* in this case, as ancillary to the appeal, and respectfully asks the Court to consider such petition for *certiorari* and the brief which will be filed in support thereof, in connection with the subject matter of this brief; and further respectfully asks that Appellee's motion to dismiss or affirm be denied.

Respectfully submitted,

BURTON E. EAMES,
Attorney for Appellant.

November 26, 1947